

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

REPLY COMMENTS OF LOGICAL TELECOM, L.P.

Logical Telecom, L.P. (“Logical”), by its undersigned attorneys, respectfully submits the following comments in response to the Federal Communications Commission’s (“FCC’s” or “Commission’s”) *Further Notice of Proposed Rulemaking* (“*FNPRM*”) released on April 30, 2012 in the above-captioned proceeding.¹ Logical submitted initial comments in response to the *FNPRM* on July 9, 2012 (“*Logical Comments*”).

Many commenters agree that the FCC lacks the authority under 47 U.S.C. § 254(d) to eliminate the limited international revenues exemption (“LIRE”) or the exemption for international-only service providers from Universal Service Fund (“USF” or “Fund”) contributions. Commenters who advocate for elimination of these international exemptions fail to demonstrate valid legal authority under which the Commission could do so. Additionally, recent statements by FCC Commissioner Ajit Pai as well as comments in the record bolster Logical’s argument that retaining the international exemptions would best serve the Section 254(b) requirement for regulatory predictability.

The record also indicates strong support for modifying the USF contribution rules to clarify that prepaid calling card providers (PCCPs) should be assessed only on amounts actually

¹ *In the Matter of Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, WC Docket No. 06-122, GN Docket No. 09-51, 77 FR 33896 (FCC 12-46) (rel. Apr. 30, 2012) (“*FNPRM*”).

collected by them from the entity to which the PCCP directly sells the prepaid card. A value-added approach to the USF contribution rules, on the other hand, is generally opposed by commenters. Finally, certain commenters recommend that safe harbors should be set at levels that encourage their use in order to promote the goal of efficiency. A safe harbor markup for PCCPs should therefore not be higher than 35%, if a mark up approach is adopted.

I. THE COMMISSION LACKS AUTHORITY TO ELIMINATE THE INTERNATIONAL-ONLY EXEMPTION OR THE LIRE

Logical is opposed to the elimination of either international exemption because, as commenters agree, the FCC plainly has no legal authority to do so. Furthermore, as evidenced in the record, the elimination of either of these exemptions would run counter to Section 254(b)'s requirement that contribution mechanisms be predictable, to the detriment of both industry and consumers.

A. Neither the FCC nor Commenters Point to any Legal Authority for Extending the USF Contribution Requirement to International-Only Service Providers

As detailed in the *Logical Comments* and supported by other commenters, the Commission is clearly limited in its authority by Section 254(d) to extending the USF contribution requirement to interstate telecommunications providers.² It is telling that while commenters set forth policy recommendations favoring the broadening of the USF contribution base in ways that would include international-only service providers,³ no commenter sets forth a

² That provision states that “[e]very telecommunications carrier that provides *interstate* telecommunications service shall contribute” to the USF. 47 U.S.C. § 254(d) (emphasis added). *See also Logical Comments* at 2-4; Comments of International Carrier Coalition at 4-6 (“International Carrier Coalition”); Comments of Ad Hoc Coalition of International Telecommunications Companies at 5 (“International Telecommunications Companies”); Comments of Asia Consultancy Group at 2-3.

³ *See, e.g.*, Comments of California Public Utility Commission at 3-4 (proposing the broadening of the contribution base to include “all services that touch the public communications network,”

credible argument regarding Commission's legal authority to do so.⁴ This is hardly surprising given that the Commission has considered and expressly rejected its authority to assess the revenues of international-only service providers.⁵ Commenters and the *FNPRM* refer to unrelated grants of statutory authority in an attempt to justify the Commission's proposal.⁶ These arguments are inapposite given that Section 254(d) unambiguously extends the contribution mechanism solely to interstate providers. The FCC simply has no legal authority to assess the revenues of an international service provider for the purposes of the USF, unless such a provider also provides interstate telecommunications services.

B. The Commission Lacks the Authority to Eliminate the LIRE

As Logical and other commenters point out, elimination of the LIRE is in direct conflict with controlling Fifth Circuit precedent.⁷ The *TOPUC* court found that requiring USF

but not addressing the issue of the Commission's authority over international-only service providers); Comments of COMPTTEL at 6 (suggesting that any telecommunications provider that benefits from the public switched telephone network be a USF contributor, without distinguishing this proposal from the Fifth Circuit's rejection of that standard)("COMPTTEL").

⁴ See Comments of Frontier Communications at 7 (recognizing the necessity of distinguishing international from interstate revenues for USF purposes, even while favoring policy that no longer makes jurisdictional distinctions in telecommunications services).

⁵ See *FNPRM* at para. 195; *Logical Comments* at n.3, n.5. This interpretation is also required by Fifth Circuit precedent. See *Logical Comments* at 3-4; International Carrier Coalition at 4-6 (explaining that because the Fifth Circuit found it both "discriminatory and inequitable" and "arbitrary and capricious" to assess more in USF contributions than a provider's total interstate revenues under Section 254(d), a provider with no interstate revenues (*i.e.*, an international-only service provider) cannot be required to contribute to the USF at all).

⁶ See COMPTTEL at 25-26 (unconvincingly citing to 47 U.S.C. § 152, which is unrelated to the USF contribution mechanism. Section 152's specific mention of foreign communications only further supports that § 254 was purposefully limited to interstate providers, to the exclusion of international-only service providers. Congress could have included "foreign communications" in § 254(d), but did not). See also *FNPRM* at 200 (also citing to portions of the Act unrelated to USF contributions which give the FCC authority over foreign relations).

⁷ See *Logical Comments* at 4-6; International Carrier Coalition at 5-6; Comments of American Prepaid Phonecall Association at 5-6 ("American Prepaid"); International Telecommunications

assessments in excess of a provider's total interstate revenues is inequitable and discriminatory in violation of Section 254(d).⁸ In contrast, those commenters opposed to the LIRE base their legal justifications for its elimination on assertions that are either baldly false,⁹ or grossly mischaracterize the findings of the *TOPUC* court.¹⁰ Although the *TOPUC* court did not specifically require the LIRE as a solution, it is telling that commenters that oppose it offer no other proposal that would address the concerns raised by the *TOPUC* court.¹¹ Clearly, the FCC cannot eliminate the LIRE without violating Section 254(d) and the *TOPUC* ruling.

C. Elimination of the LIRE or the International-Only Exemption Would Run Counter to the Predictability Requirement of Section 254(b)

A primary concern for the Commission should be the potentially hazardous effects of investment-chilling regulatory uncertainty. Evidence on the record demonstrates that elimination of the LIRE or the exemption for international-only service providers would be contrary to the

Companies at 4. *See also Texas Office of Public Utility Counsel, et. al*, 183 F.3d 393, 434-35 (1999) ("*TOPUC*").

⁸ *TOPUC* at 434-35.

⁹ *See* COMPTTEL at 31 (asserting falsely that USF assessments should not exceed interstate and international revenues—the *TOPUC* court points out the inequity of USF assessments exceeding *interstate* revenues alone).

¹⁰ *See* Comments of Verizon at 31 ("Verizon"). Verizon states that the LIRE allows providers to "game" the system, and is inequitable and discriminatory as between mostly-international providers and mostly-interstate providers. While Verizon may not consider this result fair as a policy matter, this argument provides no legal basis for the elimination of the LIRE. As explained *supra* at 2-3, Section 254(d) specifically provides for the distinct treatment of interstate and international revenues.

¹¹ Verizon proposes that to avoid the so-called discrimination created by the LIRE, the FCC should instead allow a mostly-international service provider with *de minimis* interstate revenues to take advantage of the *de minimis* exemption. *See* Verizon at 31-32. However, this does not satisfy the *TOPUC* court's concern in that a non-*de minimis* provider would pay more in USF contributions than its total interstate revenues.

requirement in Section 254(b) that the USF contribution mechanism be predictable.¹² In a recent speech, Commissioner Pai specifically recognized the danger of ignoring the USF predictability requirement, and that “a constant stream of reforms” is likely to produce uncertainty.¹³ Commissioner Pai emphasized that “[r]egulatory uncertainty is business uncertainty.’ And when businesses are uncertain, they...are hesitant to invest.”¹⁴ As stated by Commissioner Pai, the USF should be administered “consistent with the law and common sense.”¹⁵ The legal and common-sense interests of both consumers and industry in predictability clearly require maintenance of the international exemptions from USF contributions.

II. REVENUE REPORTING REQUIREMENTS FOR PREPAID CALLING CARD PROVIDERS SHOULD BE CLARIFIED

As the *FNPRM* reflects, the current revenue reporting rules for PCCPs are unworkable and in need of clarification.¹⁶ Specifically, the record confirms that 1) the FCC should clarify that PCCP contributions should be based on revenues actually collected by them; 2) a value added contribution methodology approach should not be adopted; and 3) a safe harbor markup (if one is adopted at all) should not be more than 35%.

¹² See *Logical Comments* at 6-8; American Prepaid at 2-4.

¹³ Remarks of Commissioner Ajit Pai, “Unlocking Investment and Innovation in the Digital Age: The Path to a 21st –Century FCC”, at 7, Carnegie Mellon University, Pittsburgh, Pennsylvania (July 18, 2012) (“Remarks of Commissioner Ajit Pai”).

¹⁴ Remarks of Commissioner Ajit Pai at 4 (going on to say that “billions of dollars of capital are staying on the sidelines in the communications industry” because of regulatory uncertainty). Considerable support in the field of economics supports this contention. See, e.g., Joseph Stiglitz, *Promoting Competition in Telecommunications* 14-15 (Centro de Estudios Economicos de la Regulacion Working Paper Series 1999) (underscoring the importance of commitment to a “stable regulatory process” to investment in telecommunications).

¹⁵ Remarks of Commissioner Ajit Pai at 7.

¹⁶ See *FNPRM* at para. 180.

A. Commenters Agree that Contributions Should be Based on Revenues Actually Collected by PCCPs

Commenters overwhelmingly agree that PCCPs should only report revenues actually collected by them from the entity that the PCCP sells directly to.¹⁷ Currently, PCCPs are required to report the “face value” of a card as revenue, which commenters agree is a discriminatory policy because it may be much higher than the amount collected by the PCCP when selling the card at a discount to distributors.¹⁸ As one commenter appropriately remarks, “[u]nlike any other telecommunications providers, only prepaid providers are required to contribute on revenues they never receive....”¹⁹ Instead, the Commission should clarify that PCCPs should report only revenues it actually collects from end users – the customer or distributor it sells directly to – consistent with FCC rules.²⁰ As the *Logical Comments* and others detail, PCCP distributors are not generally telecommunications carriers, and therefore those distributors must be treated as end users according to reporting instructions.²¹ The Commission

¹⁷ See *Logical Comments* at 9-10; American Prepaid at 7; International Carrier Coalition at 14; International Telecommunications Companies at 5 (*citing* Petition of Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings, at 14-15 (filed Feb. 12, 2009)).

¹⁸ See *Logical Comments* at 10-12; American Prepaid at 7 (explaining that the uniquely lengthy distribution model associated with prepaid calling cards adds higher non-telecom overhead costs, and that a face-value contribution methodology discriminatorily burdens PCCPs with contributions based on these added costs); International Telecommunications Companies at 5, 6 (also claiming that requiring PCCP reporting based on face value is in violation of generally accepted accounting principles (“GAAP”)).

¹⁹ International Carrier Coalition at 14.

²⁰ See 47 U.S.C. § 54.709(a)(1) (calculating revenues based on USF “contributors’ projected collected interstate and international revenues derived from domestic end users”).

²¹ See *Logical Comments* at 8-10; International Carrier Coalition at 14-15. See also International Telecommunications Companies at 5. The Ad Hoc Coalition of International Telecommunications Companies agrees that treating PCCP distributor revenues as end-user revenues is consistent with current policies, but proposes that PCCP distributor revenues should be treated as non–end-user revenues (*i.e.*, resellers). See *id.* Its reliance on definitions of “end user” as applied to telecommunications resellers in coming to this conclusion is inappropriate

should clarify that the non-telecommunications-provider distributors of prepaid calling cards are end users, and that PCCPs should only report revenue actually collected by them from end users.

B. A Value Added Approach Associated with the Prepaid Service Value Chain Should Not be Adopted

A revenues-based approach to PCCP reporting is favored by commenters over a value added approach.²² Commenters who address the proposed value added methodology in more general terms agree overwhelmingly that this approach should not be adopted because it would be even more burdensome to administer than the current revenues-based approach.²³ Several commenters note that the value-added approach is problematic because of the difficulty of separating telecommunications revenue from non-telecommunications revenue.²⁴ A value-added approach as applied to the prepaid market would especially create an enforcement nightmare for the FCC and at all levels of the value chain, because it would include many businesses that are not currently considered telecommunications carriers.²⁵

because PCCP distributors are not generally telecommunications providers. Furthermore, the FCC has refused to consider entities to be resellers when, like PCCP distributors, the entity does not purchase telecommunications services and provide those services on its own terms. *See, e.g., Phillipine Long Distance Telephone Company v. USA Link, L.P.*, Memorandum and Order, 12 FCC Rcd 12010, 12015-18 (1997) (citing *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, Order, 3 FCC Rcd 4604 (1988)).

²² *See supra* at n. 21.

²³ *See* COMPTel at 29; International Carrier Coalition at 9-11; Comments of Peerless Network, Inc. at 4-5; Verizon at 18-19; Comments of Coalition for Rational Universal Service and Intercarrier Reform at 10.

²⁴ *See* International Carrier Coalition at 10-11; Comments of Peerless Network, Inc. at 3-5.

²⁵ *See Logical Comments* at 12-14.

C. Fairness and Efficiency Require That A Mark Up Approach (if Adopted) Should Not Entail More than a 35% Mark Up

PCCPs should report only revenues actually collected by them for purposes of USF contributions, because any reporting approach that attempts to ‘mark up’ the actual revenues of PCCPs to retail sale amounts is discriminatory.²⁶ In the event, however, that the FCC does favor a mark up approach, and also adopts a ‘safe harbor’ mark up, Logical agrees with commenters that point out that any safe harbor should “reflect market realities” in order to incentivize the streamlined reporting that results from use of safe harbors, thereby furthering the goal of efficient administration.²⁷ For PCCPs specifically, discerning actual mark ups would be difficult or impossible, and a mark up higher than 35% would unfairly penalize PCCPs.²⁸ On the other hand, setting the safe harbor at 35% or less would promote both efficiency and fairness – important USF goals.²⁹ Therefore, a mark up on PCCP revenues should not exceed 35%.

²⁶ See *supra* at 6; *Logical Comments* at 8-10. Furthermore, as one commenter points out, prepaid calling card discounts vary so widely that no safe harbor mark up would be ever truly be fair. See *American Prepaid* at 7.

²⁷ See *Verizon* at 21; *FNPRM* at para. 23. See also *Comments of Universal Service for America Coalition* at 7-8 (“Universal Service for America”).

²⁸ See *Logical Comments* at 14-15.

²⁹ See *Universal Service for America* at 8; *Logical Comments* at 14-15.

III. CONCLUSION

For the aforementioned reasons, Logical respectfully requests that the Commission adopt the positions and recommendations set forth in its initial comments submitted in this proceeding, as well as in these Reply Comments.

Respectfully submitted,

/s/ Thomas K. Crowe

/s/ Cheng-yi Liu

Thomas K. Crowe

Cheng-yi Liu

**LAW OFFICES OF THOMAS K.
CROWE, P.C.**

1250 24th Street, N.W.

Suite 300

Washington, D.C. 20037

(202) 263-3640

firm@tkcrowe.com

**COUNSEL FOR LOGICAL
TELECOM, L.P.**

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